Puganeswaran a/l Ganesan & Ors v Public Prosecutor and other appeals

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05(M)-241–10 OF 2018(B), 05(M)-242–10 OF 2018(B) AND 05(L)-243–10 OF 2018(B)

NALLINI PATHMANATHAN, VERNON ONG AND ABDUL RAHMAN SEBLI FCJJ

28 AUGUST 2020

Evidence — Accomplice — Corroboration — Three teenagers who assisted three others in killing a man became prosecution witnesses in murder trial of the other three — Whether convictions of those charged with murder were safe based on the testimonies of the accomplices — Whether trial court cautioned itself of the need for corroboration despite s 133 of the Evidence Act 1950 saying that an accused could be convicted on the uncorroborated evidence of an accomplice — Whether several pieces of neutral evidence corroborated the testimonies of the accomplices to establish the guilt of the accused — Whether trial judge not wrong in relying on the accomplices' evidence to convict after finding they were truthful and credible witnesses

The three appellants together with three other teenagers — SP3, SP4 and SP5, who became witnesses for the prosecution — carried out a pre-planned murder of the second appellant's husband ('the deceased'), a lorry driver, while he was sleeping in the bedroom of his flat early one morning. The first appellant ('A1') was the deceased's neighbour, the second appellant ('A2') was a housewife while the third appellant ('A3') was, like SP3, SP4 and SP5 ('the accomplices'), a teenager aged between 15 and16 years at the material time. Following a trial, the High Court found all three appellants guilty of jointly committing the murder, in furtherance of their common intention to do so, and sentenced A1 and A2 to death while A3 was ordered to be detained at the pleasure of the Sultan of Selangor pursuant to s 97(2)(b) of the Child Act 2001 since he was under-aged at the time of the offence. The Court of Appeal dismissed the appeals of the appellants against conviction and sentence, resulting in the instant appeals. The prosecution's case was substantially dependent on the evidence of the accomplices who admitted their involvement in the murder. They said that on the evening of the day before the murder, they were drinking liquor at A3's house when, around 9pm, A3 took them to A1's flat where, in the presence of A2, A1 told them that the deceased was a 'bad husband' who should be killed. A1 promised the accomplices RM5,000 each if they carried out the murder. A1's plan to murder the deceased while he was asleep at home was for SP3 to hold the deceased's legs and SP5 to smother the deceased's face with a pillow while A3 stabbed him with a knife. A2's role was to signal, by way of a

missed call to A1's cellphone, when the deceased had come home from work and had gone to sleep. She was to then open the front door of her flat to allow the accomplices and A3 to enter and also to pass the pillow to SP5. The first attempt to commit the crime at about 2am failed because as soon as the accomplices and A3 entered the deceased's flat, SP4 became frightened and ran back to A1's flat. The others followed suit. At A1's flat, A1 and A3 scolded and assaulted the accomplices for their cowardice and threatened to kill them if they did not carry out the job. Since they were still frightened, A1 did some prayers at his altar, smeared some prayer ash on a parang (not the murder weapon) and handed it to SP4 and told the accomplices not to worry as everything would work out as planned. On receiving a second signal from A2, the accomplices and A3 entered the deceased's bedroom, where he was sleeping on his back, and while SP3 and SP5 carried out their respective pre-arranged tasks, A3 stabbed the deceased with a knife he was carrying. SP4, who was holding the ash-smeared parang merely stood behind A3. When the deceased woke up and started groaning in pain, all the assailants fled. As he was running away, SP4 threw the parang he was carrying on to the floor of the deceased's living room. As they were running away, A2 started screaming for help. Despite his fatal injuries, the deceased chased after his assailants but collapsed and died in the corridor in front of A1's flat. A post-mortem revealed that the deceased had died of massive blood loss from the stab wounds. The knife that A3 used to stab the deceased was never found. At the trial, the defence failed to challenge the evidence implicating A2 in the crime as well as the evidence of the forensic pathologist concerning the injuries on the deceased's body. Although the prosecution's case rested on the accomplices' evidence, the trial judge found them to be credible witnesses, ruled that a prima facie case had been made out and called on the appellants to make their defence. All the appellants denied having anything to do with the murder. A1's defence was that when he heard screams and a commotion outside his flat, he opened his front door to see A2 standing there and at the same time saw the deceased collapsing in the corridor, his body soaked in blood. A2's defence was that she was asleep in her living room when the deceased came home around 2am and went to bed. She was awakened by loud noises and then saw three persons running out of the bedroom where the deceased slept, and out of the flat through the front door. She said she screamed when she saw the deceased, soaked in blood, running after the intruders before he collapsed in the corridor outside. A3's defence was that he was watching DVDs with A1 in the latter's flat when the incident happened. In the instant appeals, the appellants argued that, inter alia, the trial judge should have rejected the uncorroborated evidence of the accomplices.

Held, unanimously dismissing the appeals and affirming the decision of the Court of Appeal:

(1) The authorities cited by the appellants did not support their contention that the trial judge was wrong in accepting the evidence of SP3, SP4 and

SP5 whom she found to be credible witnesses. The trial judge had complied with the rule on accomplice evidence and had reminded herself of the need to be cautious with their evidence and of the need for corroboration (see para 59).

(2) The law on accomplice evidence was well settled. An accused person could be convicted even on the uncorroborated evidence of an accomplice — as stated in s 133 of the Evidence Act 1950 ('the EA') — and it was totally irrelevant that the accomplice was not also charged with the crime along with the accused, a point the appellants argued should be decided against the prosecution for not charging SP3, SP4 and SP5 for the murder of the deceased. But that argument had to be rejected because, otherwise, it would not only render illusory the Public Prosecutor's constitutional power to decide who among the perpetrators of a crime should be charged and who should be made prosecution witnesses, but also render s 133 of the EA redundant and meaningless, which went against the principle that Parliament did not legislate in vain (see paras 61 & 67).

(3) On the evidence, the trial judge was right to have accepted the accomplices as witnesses of truth on all material particulars, whose evidence taken together showed that the murder of the deceased was in furtherance of the common intention of the three appellants. The testimonies of the accomplices were corroborated by at least eight strands of neutral evidence pointing to the guilt of the appellants, making it safe for the trial judge to have relied on their evidence: (a) the unchallenged evidence of the forensic pathologist about the two fatal stab wounds on the deceased's body. This corroborated SP5's evidence that A3 stabbed the deceased twice. In any case, it was never put to SP3, SP4 or SP5 in cross-examination that A3 was not present at the scene of the crime; (b) evidence of blood splattered on the floor next to the deceased's bed. This corroborated the accomplices' evidence that he was stabbed in his bedroom while he was sleeping; (c) evidence of blood on the floor of the deceased's living room. This corroborated the accomplices' evidence that the deceased came out of the bedroom after being stabbed; (d) the finding of the deceased's body in the corridor in front of A1's flat. This corroborated the accomplices' testimony that the deceased chased after his assailants before he collapsed and died; (e) the finding of the parang on the floor of the living room of the deceased's flat. This corroborated SP4's evidence that he threw it there as he fled from the crime scene; (f) the photo in exh P7 showing the altar in A1's house corroborated the accomplices' evidence that A1 had performed a prayer to bless the parang after the first attempt to carry out the murder was aborted; (g) the parang had no blood on it. This corroborated SP4's evidence that he did not use the parang to slash the deceased; and (h) the assailants entered the deceased's house twice and with ease at such an early hour. This was

strong circumstantial evidence corroborating the accomplices' testimony that A2 had, as pre-arranged, opened the main door of her house to let them in to carry out the murder. This evidence was not challenged at all in cross-examination and was therefore deemed admitted (see paras 72–74).

(4) A2 contended that she was never in A1's house at any time prior to her husband's murder and, in support of that allegation, referred to several discrepancies in the evidence of SP3, SP4 and SP5. However, those discrepancies, if at all they could be described as such, were not material as to vitiate the finding of guilt against A2. She had played a key role in her husband's murder by opening the front door of her flat to allow the accomplices to enter the premises and she also passed the pillow to SP5 — these were evidence not challenged at all in cross-examination (see paras 81 & 84–85).

(5) By finding the accomplices to be truthful witnesses, the trial judge had clearly accepted as a fact that A1 was the mastermind behind the murder although he was not present at the crime scene or when the deceased was stabbed (see para 90).

(6) It had not been shown that the concurrent findings of fact by the courts below, including the question of credibility of the accomplices, were unsupported by the evidence. In particular, it was found that the murder was committed in furtherance of the common intention of the three appellants, per s 34 of the Penal Code. The Court of Appeal was right in affirming the decision of the trial court to find the appellants guilty as charged. There was sufficient judicial appreciation of the evidence by the trial judge and she had not misdirected herself either on the facts or on the law (see paras 91 & 94–95).

[Bahasa Malaysia summary

Tiga perayu bersama tiga remaja lain — SP3, SP4 dan SP5, yang menjadi saksi utuk pendakwaan — telah menjalankan pembunuhan terancang suami perayu kedua ('si mati'), seorang pemandu lori, semasa dia tidur dalam bilik tidur flatnya pada awal pagi. Perayu pertama ('A1') ialah jiran si mati, perayu kedua ('A2') ialah seorang suri rumah manakala perayu ketiga ('A3') adalah, seperti SP3, SP4 dan SP5 ('rakan sejenayah'), seorang remaja antara 15 dan 16 tahun pada masa material. Berikutan perbicaraan, Mahkamah Tinggi mendapati semua tiga perayu bersalah kerana melakukan pembunuhan bersama, dalam melaksanakan niat mereka bersama untuk berbuat demikian, dan telah menjatuhkan hukuman mati kepada A1 dan A2 manakala A3 diperintahkan agar ditahan atas perkenan Sultan Selangor menurut s 97(2)(b) Akta Kanak-Kanak 2001 kerana dia masih di bawah umur semasa kesalahan itu. Mahkamah Rayuan menolak rayuan perayu-perayu terhadap sabitan dan hukuman, yang mengakibatkan rayuan-rayuan ini dibuat. Kes pendakwaan

banyak bergantung kepada keterangan rakan-rakan sejenayah yang mengaku terlibat dalam pembunuhan itu. Mereka mengatakan bahawa pada suatu malam sebelum pembunuhan itu, mereka minum minuman keras di rumah A3 ketika, sekitar jam 9 malam, A3 membawa mereka ke flat A1 di mana, di hadapan A2, A1 memberitahu mereka bahawa si mati adalah 'suami yang tidak baik' yang patut dibunuh. A1 menjanjikan rakan-rakan sejenayah RM5,000 setiap seorang sekiranya mereka melakukan pembunuhan itu. Rancangan A1 untuk membunuh si mati ketika dia sedang tidur di rumah adalah untuk SP3 memegang kaki si mati dan SP5 untuk menekap muka si mati dengan bantal sementara A3 menikamnya dengan pisau. Peranan A2 adalah memberi isyarat, melalui panggilan tidak dijawab ke telefon bimbit A1, ketika si mati pulang dari tempat kerja dan telah tidur. Dia kemudian membuka pintu depan flatnya untuk membolehkan rakan-rakan sejenayahnya dan A3 masuk dan juga untuk memberikan bantal ke SP5. Percubaan pertama untuk melakukan jenayah itu kira-kira pukul 2 pagi gagal kerana sebaik rakan-rakan sejenayah dan A3 memasuki flat si mati, SP4 ketakutan dan berlari balik ke flat A1. Yang lain mengikutinya. Di flat A1, A1 dan A3 memarahi dan menyerang rakan-rakan sejenayahnya kerana pengecut dan mengancam akan membunuh mereka jika mereka tidak menjalankan tugas. Oleh kerana mereka masih ketakutan, A1 melakukan beberapa doa di mezbahnya, mengoleskan abu doa pada sebilah parang (bukan senjata pembunuhan) dan menyerahkannya kepada SP4 dan memberitahu rakan-rakannya untuk tidak khuatir kerana semuanya akan berjalan lancar seperti yang dirancang. Setelah menerima isyarat kedua dari A2, rakan-rakan sejenayah dan A3 memasuki bilik tidur si mati, di mana dia sedang tidur terlentang, dan semasa SP3 dan SP5 menjalankan tugas masing-masing yang telah diatur sebelumnya, A3 menikam si mati dengan pisau yang dibawanya. SP4, yang memegang parang yang dilumurkan abu hanya berdiri di belakang A3. Ketika si mati bangun dan mula mengerang kesakitan, semua penyerang melarikan diri. Ketika dia melarikan diri, SP4 melemparkan parang yang dia bawa ke lantai ruang tamu si mati. Ketika mereka melarikan diri, A2 mula menjerit meminta tolong. Walaupun mengalami kecederaan maut, si mati mengejar penyerangnya tetapi rebah dan mati di koridor di hadapan flat A1. Bedah siasat mendedahkan bahawa si mati telah mati kerana kehilangan banyak darah akibat luka tikaman. Pisau yang digunakan A3 untuk menikam si mati tidak pernah dijumpai. Semasa perbicaraan, pihak pembelaan telah gagal mencabar keterangan yang membabitkan A2 dalam jenayah tersebut serta keteranga ahli patologi forensik mengenai kecederaan di badan si mati. Walaupun kes pendakwaan bergantung kepada keterangan rakan-rakan sejenayahh tersebut, hakim perbicaraan mendapati mereka adalah saksi-saksi yang boleh dipercayai, memutuskan bahawa kes prima facie telah dibuktikan dan memanggil perayu-perayu untuk membuat pembelaan mereka. Kesemua perayu menafikan mempunyai kaitan dengan pembunuhan itu. Pembelaan A1 adalah bahawa ketika dia mendengar jeritan dan kekecohan di luar flatnya, dia membuka pintu depannya untuk melihat A2 berdiri di situ dan pada masa yang sama melihat si mati rebah di koridor, tubuhnya berlumuran darah.

Pembelaan A2 ialah dia sedang tidur di ruang tamu ketika si mati pulang sekitar jam 2 pagi dan tidur. Dia terbangun oleh bunyi yang kuat dan kemudian melihat tiga orang berlari keluar dari bilik tidur di mana si mati tidur, dan keluar dari flat melalui pintu depan. Dia mengatakan dia menjerit ketika melihat si mati, berlumuran darah, berlari mengejar penceroboh sebelum dia rebah di koridor di luar. Pembelaan A3 ialah dia menonton DVD dengan A1 di flat A1 ketika kejadian itu berlaku. Dalam rayuan ini, perayu berpendapat bahawa, antara lain, hakim perbicaraan patut menolak keterangan yang tidak disokong oleh rakan-rakan sejenayah tersebut.

Diputuskan, sebulat suara meolak rayuan-rayuan itu dan mengesahkan keputusan Mahkamah Rayuan:

(1) Autoriti yang dipetik oleh perayu-perayu tidak menyokong hujah mereka bahawa hakim perbicaraan terkhilaf dalam menerima keterangan SP3, SP4 dan SP5 yang beliau mendapati adalah saksi-saksi yang boleh dipercayai. Hakim perbicaraan telah mematuhi peraturan berhubung keterangan rakan sejenayah dan mengingatkan diri beliau perlu berhati-hati dengan keterangan mereka dan perlu sokongan (lihat perenggan 59).

(2) Undang-undang tentang keterangan rakan sejenayah adalah tetap. Seorang tertuduh boleh disabitkan meskipun dengan keterangan yang tidak disokong rakan sejenayah — sebagaiman dinyatakan dalam s 133 Akta Keterangan 1950 ('AK') — dan ia tidak relevan langsung bahawa rakan sejenayah tidak juga dituduh degan jenayah bersama tertuduh, satu perkara yang dihujahkan perayu-perayu sepatutnya diputuskan terhadap pendakwaan kerana tidak mengenakan pertuduhan ke atas SP3, SP4 dan SP5 kerana pembunuhan si mati. Namun hujah tersebut patut ditolak, jika tidak ia bukan sahaja mengakibatkan ilusi tentang kuasa perlembangan pendakwa raya untuk memutuskan siapa antara pelaku jenayah yang patut dituduh dan siapa patut menajdi saksi pendakwaan, tetapi juga menyakibatkan s 133 AK lewah dan tidak bermakna, yang bertentangan dengan prinsip Parlimen yang tidak membuat perundangan dengan sia-sia (lihat perenggan 61 & 67).

(3) Berdasarkan keterangan, hakim perbicaraan adalah betul kerana menerima rakan-rakan sejenayah sebagai saksi-saksi kebenaran atas semua butiran material, yang mana keterangan mereka diambil secara keseluruhan menunjukkan bahawa pembunuhan si mati adalah bagi dilaksanakan niat bersama ketiga-tiga perayu tersebut. Keterangan rakan-rakan sejenayah itu telah disokong oleh sekurang-kurangnya lapan keterangan neutral yang enunjukkan keberslaahan perayu-perayu, menjadikannya selamat untuk hakim perbicaraan bergantung kepada keterangan mereka: (a) bukti yang tidak dapat dicabar oleh ahli patologi forensik mengenai dua luka tikaman maut di badan si mati. Ini

menyokong keterangan SP5 bahawa A3 menikam si mati dua kali. Bagaimanapun, ia tidak diutarakan kepada SP3, SP4 atau SP5 semasa pemeriksaan balas bahawa A3 tidak hadir di tempat kejadian jenayah; (b) bukti darah berlumuran di lantai di sebelah katil si mati. Ini menyokong keterangan rakan sejenayah bahawa dia ditikam di bilik tidurnya ketika dia sedang tidur; (c) bukti darah di lantai ruang tamu si mati. Ini menyokong keterangan rakan sejenayah bahawa si mati keluar dari bilik tidur setelah ditikam; (d) penemuan mayat si mati di koridor di hadapan flat A1. Ini menyokong keterangan rakan sejenayah bahawa si mati mengejar penyerangnya sebelum dia rebah dan mati; (e) penemuan parang di lantai ruang tamu flat si mati. Ini menyokong keterangan SP4 bahawa dia membuangnya ke sana semasa dia melarikan diri dari tempat kejadian; (f) foto dalam eksh P7 yang menunjukkan mezbah di rumah A1 menyokong keterangan rakan sejenayah bahawa A1 telah berdoa untuk memberkati parang itu selepas percubaan pertama untuk melakukan pembunuhan itu dibatalkan; (g) tiada darah pada parang itu. Ini menyokong keterangan SP4 bahawa dia tidak menggunakan parang untuk menikam si mati; dan (h) penyerang-penyerang memasuki rumah si mati dua kali dengan mudah pada awal pagi. Ini adalah keterangan mengikut keadaan yang kuat bagi menyokong keterangan rakan-rakan sejenayah bahawa A2 telah, sepertimana dirancang terlebih dahulu, membuka pintu utama rumahnya untuk memberi mereka masuk bagi melakukan pembunuhan itu. Keterangan ini tidak dicabar langsung dalam pemeriksaan balas dan oleh itu dianggap diakui (lihat perenggan 72–74).

(4) A2 menegaskan bahawa dia tidak pernah beradan dalam rumah A1 pada bila-bila masa sebelum pembunuhan suaminya dan, dalam menyokong pengataan tersebut, telah merujuk kepada beberapa percanggahan dalam keterangana SP3, SP4 dan SP5. Walau bagaimanapun, percanggahan tersebut, jikapun ia dapat diperihalkan begitu, tidak penting untuk melemahkah dapatan bersalah terhadap A2. Dia memainkan peranan utama dalam pembunuhan suaminya dengan membuka pintu depan flatnya untuk membenarkan rakan-rakan sejenayah itu memasuki preis itu dan dia juga telah memberi bantal kepada SP5 — yang merupakan keterangan yang tidak dicabar langsung dalam pemeriksaan balas (lihat perenggan 81 & 84–85).

(5) Dengan mendapati rakan-rakan sejenayah adalah saksi-saksi yang boleh dipercayai, hakim perbicaraan jelas menerimanya sebagai kenyataan bahawa A1 adalah dalang pembunuhan itu meskipun dia tidak berada ditempat kejadian jenayah itu atau semasa si mati ditikam (lihat perenggan 90).

(6) Ia tidak ditunjukkan bahawa penemuan fakta serentak oleh mahkamah bawahan, termasuk persoalan tentang kebolehpercayaan rakan-rakan

sejenayah, tidak disokong oleh keterangan. Secara khusus, ia didapati bahawa pembunuhan itu telah dilakukan bagi tujuan melaksanakan niat bersama ketiga-tiga perayu itu, menurut s 34 Kanun Keseksaan. Mahkamah Rayuan adalah betul dalam mengesahkan keputusan mahkamah perbicaraan yang mendapati perayu-perayu bersalah sebagaimana dituduh. Terdapat pemahaman kehakiman yang mencukupi tentang keterangan itu oleh hakim perbicaraan dan beliau tidak saaah arah sama ada dari segi fakta atau undang-undang (lihat perenggan 91 & 94–95).]

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359, HC (refd)
Antonio Dias Caldeira v Frederick Augustus Gray [1936] 1 MLJ 110; [1934] 1 LNS 5, PC (refd)8
Attan bin Abdul Gani v PP [1970] 2 MLJ 143b (refd)
Birendra Kumar Ghosh v Emperor AIR 1925 PC 1, PC (refd)
Browne v Dunn (1894) 6 R 67, HL (refd)
Chiu Nang Hong v PP [1965] 1 MLJ 40, PC (refd)
Chong Chee Liong v PP [2008] 2 MLJ 797, CA (refd)
Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41b, PC (refd)
Dato' Seri Anwar bin Ibrahim v PP and another appeal [2004] 3 MLJ 405, FC (refd)
De Silva v PP [1964] 1 MLJ 81 (refd)
Director of Public Prosecutions v Hester [1973] AC 296 HL (refd)
Ferose bin Tamure Mohamad Khan v PP [2016] 6 MLJ 277 (refd)
Goh Chong Ying v PP [1989] 2 MLJ 334, HC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137, SC (refd)
Khoon Chye Hin v PP [1961] MLJ 105b (refd)
Mahboob Shah v Emperor AIR 1945 118, PC (refd)
Manikumar Sinappan & Ors v PP [2015] MLJU 1956; [2016] 2 MLRA 1, HC (refd)
Md Usaf v R A 1929 N 215 (refd)
Megat Halim bin Megat Omar v Pendakwa Raya [2008] MLJU 647; [2009] 1 CLJ 154, CA (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15; [1976] 1 LNS 180 (refd)
PP v Lim Kiang Chai [2016] 2 MLJ 153; [2016] 4 CLJ 173, FC (refd)
PP v Mohd Radzi Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Munusamy [1979] 2 MLJ 286; [1980] 1 LNS 63, FC (refd)
PP v Sarjeet Singh & Anor [1994] 2 MLJ 290, HC (refd)
PP v Yuvaraj [1969] 2 MLJ 89; [1968] 1 LNS 115, PC (refd)
Podmore's, Re (1930) 22 Cr App Rep 36 (refd)
R v Hills [1988] 86 Cr App R 26, CA (refd)8
R v Maganlal 14 B 115 (refd)

A *Sabarudin bin Non & Ors v PP* [2005] 4 MLJ 37, CA (refd)
Samar binte Mansor v Mustafa Kamarul Arifin [1974] 2 MLJ 71, FC (refd)
Ugar v State of Bihar AIR [1965] SC 277, SC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212; [1980] 1 LNS 138, FC (refd)
Woolmington v DPP [1935] 1 AC 462; (1936) 25 Cr App R 72 (refd)
B *Yap Ee Kong & Anor v PP* [1981] 1 MLJ 144, FC (refd)

Legislation referred to

Child Act 2001 s 97(2)(b)
C Criminal Procedure Code ss 180(4), 182A
Evidence Act 1950 s 133
Penal Code ss 34, 300(a)
Penal Code [IND] s 34

D **Appeal from**: Criminal Trial No 45B-184–08 of 2012 (High Court, Shah Alam)

Sahadeva a/l Arunasalam (Saha & Assoc) for the first appellant.
Surjan Singh Sidhu (Surjan Singh Sidhu & Co) for the second appellant.
E *K Viknesvaran (Viknes Ratna & Co) for the third appellant.*
Nahra bt Dollah (Deputy Public Prosecutor, Attorney General's Chambers) for the public prosecutor.

Abdul Rahman Sebli FCJ (delivering judgment of the court):

F THE BACKGROUND FACTS

[1] In the High Court at Shah Alam the appellants were jointly tried for the murder of one Ganeshan a/l Muniandy and the charge against them was as
G follows:

> Bahawa kamu bersama-sama pada jam lebih jurang 0247 pagi 16 Februari 2012 di alamat No 3A16, Blok A, Flat Petaling Utama, di dalam Daerah Petaling Jaya, di dalam Negeri Selangor Darul Ehsan, dalam mencapai niat bersama kamu bertiga, telah melakukan bunuh dengan menyebabkan kematian terhadap Ganeshan a/l
H Muniandy (No K/P: 8111301-14-5521) suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan dibaca bersama Seksyen 34 Kanun yang sama.

[2] They claimed trial to the charge at the conclusion of which they were
I found guilty as charged. The first and second appellants were sentenced to death whilst the third appellant was ordered to be detained at the pleasure of DYMM Sultan of Selangor pursuant to s 97(2)(b) of the Child Act 2001 (Act 611) as he was under-aged at the time of the offence. Their appeals to the Court of Appeal were dismissed, hence the present appeals before us.

[3] The primary facts as disclosed by the evidence and which both the High Court and the Court of Appeal accepted as credible and accurate are as follows. The deceased, Ganeshan a/l Muniandy was the husband of the second appellant. They had been married for nine years and had a daughter aged five years. The deceased worked as a lorry driver whilst the second appellant worked full time as a housewife. They lived next door to the first appellant.

[4] The second appellant knew the third appellant through the first appellant and it was the third appellant who introduced them to the three prosecution witnesses, namely Geethavan a/l Ravi (SP3), Viknesshen a/l Yogarajoo (SP4) and Darshan a/l Kanagaraju (SP5) who, like the third appellant were under-aged, being only 15–16 years old at the material time. According to SP3, he was told by the third appellant that the first and second appellants were lovers.

[5] These three witnesses were the lynchpin of the prosecution case. They admitted their involvement in the murder of the deceased, along with the third appellant. Thus the prosecution was relying on direct evidence, albeit that of accomplices to prove its case against the appellants rather than on circumstantial evidence. As such, it was a matter of either to believe or to disbelieve their evidence by the trial judge who had the audio-visual advantage of seeing and hearing them giving evidence, subject of course to the rule on acceptance of accomplice evidence.

[6] In *Public Prosecutor v Sarjeet Singh & Anor* [1994] 2 MLJ 290 it was held, inter alia, that the credibility of an accomplice must be individually judged just as any other witness, applying the same considerations but with the added ingredient of him being an accomplice and that the court must take stock of the situation and consider who and what the accomplice is, his demeanour, bearing, the manner, quality and substance of his evidence in itself and in relation to all the circumstances of the case.

[7] The evidence of SP3, SP4 and SP5 was that in the evening of 15 February 2012, ie the day before the murder, they went to the third appellant's house at the invitation of the third appellant. They were then brought by the third appellant to the first appellant's house. There, the third appellant gave SP3 some money to buy alcohol. SP3 bought vodka and thereafter he together with SP4 and SP5 returned to the third appellant's house. They chatted and drank vodka that evening but were not drunk.

[8] At 9pm they were again brought to the first appellant's house by the third appellant. The second appellant was present on this occasion. It was at this meeting that the first appellant told SP3, SP4 and SP5 that the deceased was a bad husband as he had asked his wife the second appellant to do some dirty job

for other men ('ajak lelaki lain buat kerja kotor'). For that reason, the first appellant wanted the deceased to be killed and promised SP3, SP4 and SP5 RM5,000 each to do the job, which was to be paid using the deceased's EPF savings.

[9] The plan by the first appellant to murder the deceased was gruesomely simple with the direct involvement of the second appellant. The modus operandi was for SP3 to hold the deceased's legs, SP5 to cover the deceased's face with a pillow and the third appellant to finish the deceased off by stabbing him with a knife.

[10] As for the second appellant, her role was to signal to the first appellant that the deceased had returned home from work and had gone to sleep. She was to do this by making a missed call to the first appellant. She was then to open the front door of their house to allow SP3, SP4, SP5 and the third appellant to enter and to pass the pillow to SP5.

[11] At about 2am on 16 February 2012, the first appellant received a missed call from the second appellant. The first appellant then instructed the third appellant, SP3, SP4 and SP5 to proceed next door to carry out his nefarious plan. As pre-arranged, the second appellant opened the front door of the house and passed the pillow to SP5.

[12] But before they could take the next step, SP4 became scared and he ran out of the house. This was followed by SP3, SP5 and the third appellant and they returned to the first appellant's house. At the first appellant's house, the third appellant scolded SP3, SP4 and SP5 and questioned their manhood. He hit SP3's back with a knife, injuring him, and the first appellant slapped SP4. They threatened to kill SP3, SP4 and SP5 if they refused to do what they were told to do.

[13] After about an hour, SP3, SP4 and SP5 were again asked to carry out the original plan, but they told the first and third appellants that they were scared. On hearing this, the first appellant performed a 'puja' prayer in front of the altar in his house. During the 'puja' prayer, the first appellant rubbed the parang (exh X9) with prayer ash. After the 'puja' prayer, the first appellant handed the parang to SP4. The first appellant then told SP3, SP4 and SP5 not to worry as the parang had been blessed. It was an assurance by the first appellant that everything would go as planned.

[14] The deceased's fate was sealed when the second appellant made the second missed call at about 2.45am The first appellant immediately instructed the third appellant, SP3, SP4 and SP5 to finish the job. The front door of the

deceased's house was opened by the second appellant and she passed the pillow to SP5.

FAILURE TO CROSS-EXAMINE

[15] We pause here to note that this crucial part of the case for the prosecution, which directly and gravely implicated the second appellant in the murder of her husband, was not challenged at all in cross-examination. The evidence is therefore deemed to be admitted see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; [1980] 1 LNS 138.

[16] Evidence that is not challenged in cross-examination needs no corroboration, even where it comes from an accomplice. It must be taken as proved unless the evidence is so inherently incredible that no reasonable tribunal would accept it as true or that the evidence has been effectively rebutted by other evidence led by the prosecution.

[17] Yet the appellants are now contending that the evidence of SP3, SP4 and SP5 should not be believed, although they fall short of saying that the evidence is inherently incredible. The following exposition by Lord Halsbury in the House of Lords case of *Browne v Dunn* (1894) 6 R 67 answers the point:

> To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them as opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

[18] The same point was lucidly explained by Mukharji J in *AEG Carapiet v AY Derderian* AIR 1961 Cal 359 in the following terms:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross- examination, it must follow that the testimony given could not be disputed at all. *It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice*. It serves to prevent surprises at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is made comes to give evidence by producing witnesses.
>
> It has been stated on high authority of the House of Lords that this much counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or which that witness had any share. *If he asked no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety*. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has

A finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated. (Emphasis added.)

B **[19]** The principle applies to both civil and criminal cases. The duty to put the defence version of events to the prosecution witnesses was again emphasised in *Megat Halim bin Megat Omar v Pendakwa Raya* [2008] MLJU 647; [2009] 1 CLJ 154 where Abdull Hamid Embong JCA (as he then was) delivering the judgment of the Court of Appeal said:

C Although in our criminal jurisprudence, there is no burden on an accused person to prove his innocence but merely for him to raise a reasonable doubt as to his guilt, it is trite that his defence should be put to the prosecution at an early stage during the prosecution case. Failure to do so may move the trial court to dismiss a particular line of defence as an afterthought, or a recent invention as happened in this case.

D **[20]** This is not to say that mere failure by the defence to challenge any crucial part of the prosecution case must lead to a conviction, as the duty to prove the case beyond any reasonable doubt, subject to any exception to the rule, rests with the prosecution throughout and does not shift: see *Woolmington v DPP* [1935] 1 AC 462; (1936) 25 Cr App R 72 where Viscount Sankey LC said:

E Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to ... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner ... the prosecution has not made out the case and the prisoner is entitled to an acquittal.

F

G **[21]** It may be of interest to know briefly the facts of the case. Woolmington was a 21 year-old farm labourer. On 22 November 1934, three months into his marriage to Kathleen Woolmington, she left him and went to live with her mother. On 10 December 1934, he stole a double barrelled shotgun and cartridges from his employer, cycled to his mother in law's house and shot his wife, killing her. He was arrested and charged with willful murder.

H **[22]** Woolmington claimed that he did not mean to kill her. He said he went over to try and win her back and threatened to kill himself, but accidently shot her in the heart. At the Bristol Assizes (old version of trial by jury), Swift J ruled that the case was so strong against Woolmington that the burden of proof was

I on him to show that the shooting was accidental. On 14 February 1935, he was convicted and sentenced to death.

[23] He appealed on the ground that the trial judge misdirected the jury. Avory J refused the appeal, relying on a passage from Foster's Crown law which

stated that when a murder took place, then it was reasonable to assume that the prisoner was guilty unless he had evidence to prove otherwise. The issue was brought to the House of Lords to determine whether that was a correct statement. This was where Viscount Sankey LC made his 'golden thread' speech referred to in para [19] above. Woolmington's conviction was quashed and he was acquitted.

[24] SP3's, SP4's and SP5's testimony was that after entering the deceased's house, they went straight to the deceased's bedroom. As pre-arranged, SP5 covered the deceased's face with the pillow given by the second appellant while SP3 held the deceased's legs. According to SP3, the deceased was lying on his back when he was holding his legs. At the same time the third appellant stabbed the deceased with the knife that he was carrying. According to SP5, he saw the third appellant stabbing the deceased twice. SP4, who was carrying the parang (exh X9), only stood behind the third appellant.

[25] The stabbing woke the deceased up and he groaned in pain. The third appellant, SP3, SP4 and SP5 then ran away through the same door that they had entered earlier. SP4 was the first to run away and he incurred the wrath of the third appellant for releasing the deceased's legs too early.

[26] SP4 threw the parang on the floor in the living room of the deceased's house, which he positively identified at the trial through photo number 19 of exh P8. The deceased's DNA was found on the parang but no trace of human blood was found on it, either of the deceased or of anyone else. SP4 said he heard the second appellant screaming for help as he was running away from the scene.

[27] Despite being fatally injured, the deceased managed to get up and chased after his assailants but collapsed and died in the corridor in front of the first appellant's house. Photos number 13 and 14 of exh P8, which were taken by the police photographer (SP1) before the deceased's body was removed, confirmed that this was the exact spot where he collapsed and died, not far away from the bedroom where he was stabbed.

[28] Photos no 28 and no 33 of exh P8 show splattered blood on the floor right next to the bed where the deceased was stabbed and blood was also found on the floor in the living room as shown in photos nos 19, 20, and 21 of exh P8. The presence of blood in these locations confirms SP3's, SP4's and SP5's evidence that the stabbing took place in the deceased's bedroom and that the deceased went out of the room to chase after them after he was stabbed by the third appellant.

[29] The knife that was used by the third appellant to stab the deceased was

never found. According to the investigating officer (SP15), the information that he received was that the knife was thrown into the Kelang river after the murder. He and the police scuba diver team tried to retrieve it from the river bed but was unsuccessful as the current was too strong.

FORENSIC EVIDENCE

[30] The deceased's body was brought to the Universiti Hospital, Petaling Jaya on the same day that he was murdered and a post-mortem was conducted by Forensic Pathologist Dr Prashant Naresh Samberkar (SP2) at 10am He found the following external injuries on the deceased's body:

(a) a 5.5cms x 1.8cms penetrating stab wound over the right eighth intercostal space, causing a soft tissue haemorrhaging over the seventh x eighth ribs over the front of the rib cage, slicing the eighth rib costal cartilage and entering the abdominal cavity, causing entry and exit wound on the lower 1/3rd of right lobe of liver and further entering and exiting the body of the stomach;

(b) a 4cms x 2cms incised wound on the outer surface of the left knee;

(c) a 7cms incised wound on the back of the left arm;

(d) a 72.5cms x 0.3cms incised wound on the back of lower 1/3rd of left arm;

(e) a 5cms x 1.5cms penetrating stab wound on the left loin; and

(f) a 5cms x 0.8cms penetrating stab wound on the upper and inner 1/3rd of the right gluteal region.

[31] SP2 determined the cause of death to be due to 'Haemorrhagic shock due to multiple penetrating stab wounds'. According to him, the fatal injuries were injuries No 1 and No 5, which had caused massive loss of blood. Injury No 1 was caused by a stab to the chest which penetrated the liver whilst injury No 2 was caused by a stab to the left loin which damaged the kidney. Both injuries were inflicted using a sharp weapon 10–15cm or more in length. This crucial part of the prosecution case was also not challenged in cross-examination and is therefore deemed to be admitted. In any event there was no expert evidence to the contrary.

[32] Whoever inflicted these fatal injuries on such vital parts of the deceased's body with such dangerous weapon must have intended to cause his death, an act that falls within the definition of murder under s 300(a) of the Penal Code. Given SP2's unchallenged and uncontradicted evidence that the deceased was stabbed to death, we do not consider the failure by the prosecution to recover and produce the murder weapon at the trial to have undermined the prosecution case in any way.

[33] It was also SP2's testimony that the injuries were ante-mortem, meaning to say they were inflicted when the deceased was still alive. SP2 confirmed that the deceased did not suffer from any disease which caused or contributed to his death. He further confirmed that the stomach of the deceased contained undigested food and alcohol.

PRIMA FACIE CASE

[34] On these primary facts, the learned trial judge found, rightly in our view, that a prima facie case had been established against the appellants. As they stood, the direct evidence of SP3, SP4 and SP5 which the learned trial judge accepted as the truth, and inferences to be drawn from the surrounding circumstances and probabilities of the case, would warrant the appellants' convictions if unrebutted or unexplained: see s 180(4) of the Criminal Procedure Code ('the CPC') which provides as follows:

> (4) For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which *if unrebutted or unexplained would warrant a conviction*. (Emphasis added.)

[35] In finding SP3, SP4 and SP5 to be credible witnesses, the learned trial judge had reminded herself of the need to be cautious with their testimonies and of the need for corroboration. She did not therefore fall into the same error that the trial judge in *Datuk Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 fell into as can be seen from the following remarks by Suffian LP delivering the judgment of the former Federal Court:

> It is true that the judge nowhere stated in explicit terms that he was aware of the danger of convicting on the uncorroborated evidence of an accomplice and that the corroboration required must be independent testimony which confirms in some material particular not only that the crime has been committed, but also that the accused committed it *The King v Baskerville* [1916] 2 KB 658 and *Chiu Nang Hong v Public Prosecutor* [1965] 1 MLJ 40.

THE DEFENCE CASE

[36] When called upon to state their defence, the appellants chose to give sworn evidence. The first appellant's explanation was that at the time of the incident, he heard someone screaming and running at the corridor of his house. He then heard someone knocking on the door of his house and when he opened the door, it was the second appellant. At the same time he saw the deceased collapsing in front of his house, soaked in blood.

[37] According to him, the third appellant also came over to his house. He said he and the third appellant just watched what was unfolding before their

eyes, without doing anything. Earlier in examination in chief however, he had said that he was alone in the house from 2am to 4am on 16 February 2012. It was only after being told by his counsel to think carefully ('fikir betul-betul') that he quickly changed his story by saying that the third appellant was with him all along.

[38] A few minutes later, members of the public came and the first appellant said he asked the third appellant to go home. The police and the ambulance arrived about 20 minutes later. After the police had done their work, the first appellant cleaned the area where the deceased collapsed using a mop which he took from his house.

[39] The first appellant confirmed that he was arrested the next day. He claimed that while at the police station, he was assaulted by the police and asked to confess to the murder of the deceased or else his parents would be investigated and charged with the murder. The first appellant's defence, in short, was that he had nothing to do with the deceased's death as he was in his house watching DVD with the third appellant when the murder was committed next door.

[40] As for the second appellant, her explanation was that on 16 February 2012 at about 2.30am, she was in her house at No 3A-16, Blok A, Petaling Utama Flat, Petaling Jaya Selangor with her five year old daughter. She testified that when the deceased came home at about 2am, she opened the door and unlocked the grille, and then returned to the sofa where she had been lying down earlier. She said the deceased looked unstable and she scolded him and he scolded her back.

[41] The deceased then asked her to prepare something for him to eat and went straight to his bedroom to change his clothes. When the deceased did not come out after five minutes, she said she went to check and saw that the deceased was already sleeping. She then switched off the lights and returned to the sofa in the living room and fell asleep.

[42] She said it was normal for her to wait in the living room every night for the deceased to come home. The reason she gave was that when she slept in the bedroom, she would not be able to hear the knock on the front door. When that happened, she would be late in opening the door and this would enrage the deceased and he would hit and kick her.

[43] The second appellant went on to testify that while she was sleeping, she was awakened by a loud commotion in the bedroom where the deceased was sleeping. When she got up, she saw three persons running out of the room and heading towards the main door. She said she did not know who opened the

main door and grille. She assumed that the deceased had not locked them when he returned home from work.

[44] The second appellant further testified that when she saw the three persons running out of the house, she screamed and at the same time she saw the deceased coming out of the bedroom heading towards the front door. His body was full of blood. She said she followed the deceased to the corridor of the flat where she saw him collapsing. She screamed for help. Within minutes her neighbours came over, followed by the police and the ambulance.

[45] She said she was arrested at 9pm the following day after the burial of the deceased and after she was called to the police station. At the police station she said she was assaulted by the police and forced to sign 10–11 pages of blank documents. In short, the second appellant's defence was that she had slept through the murder of her husband.

[46] Lastly, the defence of the third appellant. His explanation was that at all material times on 16 February 2012, he was at the first appellants' house. He said that at about 2am he was watching DVD with the first appellant and there was no one else with them in the house. He said he did not go out and neither did anyone enter the house throughout the time that he was in the first appellant's house. He said he remained in the first appellant's house until he saw the deceased's body in front of the house.

[47] According to the third appellant, what happened that early morning was that while he and the first appellant were watching DVD, suddenly he heard someone running in front of the house and when the first appellant opened the door, he saw someone whom he did not know collapsing in front of the house and the person was still alive. He was then asked by the first appellant to go home, which he did. He said he did not tell anyone about the incident as he was scared.

[48] The third appellant further testified that on the morning of 16 February 2012, he had gone to the hospital for an appointment as he had fractured his left hand in a motorcycle accident. He said his left hand was cast in white plaster of paris. He said he was still in the hospital ward when he was arrested by the police two days after the incident. He said he was with is mother throughout his stay at the hospital. In short the third appellant's defence was that he had nothing to do with the murder of the deceased as he was at the first appellant's house watching DVD with the first appellant.

NO LEGAL BURDEN ON THE APPELLANTS

[49] It is a cardinal principle of criminal law that the burden lies throughout on the prosecution to prove its case beyond any reasonable doubt. It is a heavy burden and is only half discharged by establishing a prima facie at the close of its case. The law is trite that an accused person has no duty to prove or to disprove anything unless he has a legal burden to discharge, such as the burden of rebutting a statutory presumption or to prove any of the general exceptions under the Penal Code, in which case his burden is discharged if he proves his case on the balance of probabilities (as opposed to proof beyond reasonable doubt): see *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89; [1968] 1 LNS 115 (PC).

[50] Where however a prime facie case has been established against the accused and he chooses to remain silent when called upon to state his defence, the court must proceed to convict him: see *Public Prosecutor v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457. In the present case, the appellants had no burden to prove or to disprove anything in their defence. They were entitled to an acquittal if their explanation succeeded in raising a reasonable doubt in the mind of the trial judge as to their guilt.

REASONABLE DOUBT

[51] A 'reasonable doubt' however does not mean just any doubt conjured up by the accused to create a difficulty in the trial judge's mind. The meaning of 'reasonable doubt' has been explained by Lord Hewart CJ in *Re Podmore's* (1930) 22 Cr App Rep 36 in the following terms in his direction to the jury:

> You will not, I am sure, allow yourselves to be bewildered or troubled by such a phrase. What it means is not some whimsical or fanciful doubt, which a person might conjure up for the purpose of creating a difficulty but such a doubt as would govern a man's course of action in some private affair or moment of his own.

[52] In *Underhill's treaties on the Law of Criminal Evidence* (5th Ed Vol 1 at p 34), the following passage on 'reasonable doubt' can be found:

> A vague conjecture or an inference of the possibility of the innocence of the accused is not a reasonable doubt. A reasonable doubt is one which arises from a consideration of all the evidence in a fair and reasonable way. There must be a candid consideration of all the evidence and if, after this candid consideration is had by the jurors, there remains in their minds a conviction of the guilt of the accused, then there is no room for a reasonable doubt.

[53] Perhaps the most oft-quoted definition of the expression 'proof beyond reasonable doubt' is that given by Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372 where at p 373 the learned judge said:

That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. *Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt*. The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt. (Emphasis added.)

THE COURT'S DUTY AT THE CONCLUSION OF TRIAL

[54] The procedure to be followed by the court at the conclusion of the trial is prescribed by s 182A of the CPC which provides as follows:

182A(1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.

(3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[55] Having directed her mind to this provision, the learned trial judge then proceeded to carefully consider the defence case against and in the light of the prosecution evidence. Having done so, she found that the appellants' explanation failed to raise any reasonable doubt in her mind as to the truth of the prosecution case and that the prosecution had proved its case beyond any reasonable doubt. She was satisfied that the third appellant's act of stabbing the deceased to death was done in furtherance of the common intention of all three appellants to kill the deceased. In common parlance, she was sure of their complicity in the crime.

[56] Far from casting a reasonable doubt in the case for the prosecution, the second appellant's evidence in fact strengthened the prosecution case by confirming in material particulars SP3's, SP4's and SP5's evidence. In particular, she confirmed their evidence that the door to the deceased's house was left open before and after the murder and that she screamed for help as the deceased came out of his bedroom to chase after his assailants.

[57] The second appellant's claim that she saw only three persons running out of the deceased's bedroom after the murder has to be an afterthought and an attempt to save the third appellant from punishment as it was never put to SP3, SP4 and SP5 in cross-examination, who testified that all four of them, including the third appellant, ran out of the room after the murder.

A ACCOMPLICE EVIDENCE

[58] This was the main plank of the appellants' argument before us, that the testimonies of SP3, SP4 and SP5 ought to have been rejected by the trial judge as they were accomplices and there was no independent corroboration of their B evidence. We were referred to the following authorities for support:

(a) *Goh Chong Ying v Public Prosecutor* [1989] 2 MLJ 334, a decision of the Singapore High Court case where Chua J held as follows:

> The trial judge relied entirely on the testimony of the two accomplices. He C had wrongly admitted and relied on the evidence of the appellant's allegedly past criminal act. He did not pay proper and careful consideration to the evidence of the accomplices. The many material inconsistencies, self contradictions and discrepancies were serious and should cast grave doubts on the credibility of Pannir and Tan Yong Kwang. The trial judge failed to realize that one accomplice cannot corroborate each other. D

(b) *Director of Public Prosecutions v Hester* [1973] AC 296 where Lord Diplock said:

> ... an analogy with the common law rule as to accomplices who are particeps criminis in the actual offence charged. The practice of giving the warning as E to the desirability of confirmation from another source when more than one accomplice gave evidence implicating the accused seems to have originated in the opinion expressed by Littledale J in his summing up in *Reg v Noakes* (1832) 5 C & P 326.
>
> There is a continuing logical basis for the practice, for the reason which makes F one accomplice a suspect witness, viz, the natural temptation to exculpate himself or to minimize the part which he played in a common crime, applies also to any other accomplice in the same crime, and there is every reason for them to concert together to tell the same false story.

G (c) *Chong Chee Liong v Public Prosecutor* [2008] 2 MLJ 797, a decision of the Court of Appeal where Hasan Lah JCA (as he then was) quoted a passage in *Sarkar on Evidence* (14th Ed) at p 1924 which states that the principal reasons for holding accomplice evidence to be untrustworthy, are: (1) because an accomplice is likely to swear falsely in order to shift the H guilt from himself; (2) because an accomplice being a participator in crime, and consequently an immoral person, is likely to disregard the sanction of an oath; and (3) because an accomplice gives his evidence under the promise of a pardon, or in the expectation of an implied pardon; if he discloses all he knows against those whom he acted I criminally, and this hope would lead him to favour the prosecution (per Scott J in *R v Maganlal* 14 B 115; *Md Usaf v R A* 1929 N 215).

[59] We must say with respect that the authorities relied upon by the appellants are authorities on general principles of law on how the court is to

treat accomplice evidence. They do not support the appellants' contention that the learned trial judge was wrong in accepting SP3, SP4 and SP5 as credible witnesses. As we mentioned, she had complied with the rule on accomplice evidence by reminding herself of the need to be cautious with their evidence and of the need for corroboration.

[60] For obvious reasons, the decisions in those cases must be confined to their own peculiar facts and circumstances. In the first of the three cited cases, apparently the trial judge had considered the evidence of another accomplice as corroboration, which was a clear misdirection in law warranting appellate intervention.

[61] The law on accomplice evidence is well settled. An accused person may be convicted even on the uncorroborated evidence of an accomplice and it is totally irrelevant that the accomplice is not charged together with the others who committed the same crime, a point that the appellants argued must be decided against the prosecution for not charging SP3, SP4 and SP5 with the same offence that the three appellants were charged with. This is made explicitly clear by s 133 of the Evidence Act 1950, which reads:

> 133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

[62] In *Public Prosecutor v Lim Kiang Chai* [2016] 2 MLJ 153; [2016] 4 CLJ 173 this is what this court had to say on accomplice evidence:

> [75] Despite the parties' non-submission before the High Court and before us as to whether PW26 was an accomplice, we hold the view that PW26 was an accomplice. It is trite that an accused person may be convicted solely on the evidence of an accomplice provided that he is found to be a credible witness and that the court had warned itself on the danger of convicting the accused on an uncorroborated evidence of an accomplice: see s 133 of the Evidence Act, *Lee Choh Pet & Ors v Public Prosecutor (No 2)* [1972] 1 MLJ 187; [1972] 1 LNS 65, *Thavanathan Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401; [1997] 3 CLJ 150.

[63] In *Ferose bin Tamure Mohamad Khan v Public Prosecutor* [2016] 6 MLJ 277, this court made the following observations at para 108 of the judgment:

> [108] As a starting point, s 133 of the Evidence Act 1950 provides that an accomplice is a competent witness against an accused person, and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Illustration (b) of s 114 of the same Act provides that the court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In respect of the nature and extent of the corroboration, Raja Azlan Shah CJM (as His Majesty then was) in *Yap Ee Kong & Anor v Public Prosecutor* [1981] 1 MLJ 144 (at p 146) formulated the rules as follows:

A (1) There should be some independent confirmation tending to connect the accused with the offence although it is not necessary that there should be independent confirmation of every material circumstance;

(2) The independent evidence must not only make it safe to believe that a crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particulars the testimony of the accomplice; and

B

(3) The corroboration must come from independent sources, thus bringing out the rule that ordinarily the testimony of an accomplice would not be sufficient to corroborate that of another.

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[64] The case of *Yap Ee Kong & Anor v Public Prosecutor* [1981] 1 MLJ 144 that this court referred to in the above case was a re-affirmation of the rule laid down by Sharma J in *Attan bin Abdul Gani v Public Prosecutor* [1970] 2 MLJ 143b where the learned judge had said:

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> There is no magic in the use of the word 'corroboration'. The existence of corroboration is not dependent upon the use of that word. The main thing to look for is whether it exists. In some cases it may require some effort, examination and analysis of the evidence to find it, while in others, as in this case, it may appear undisguised and manifest on the face of the record itself.

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[65] After referring to various authorities, the learned judge went on to summarise the law on corroboration as follows:

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> The law as to corroboration as enunciated by the various authorities may be summarised thus:
>
> It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear:

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> (1) It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.

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> (2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime.

(3) The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another.

(4) The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime.

(5) Corroboration must be in material particulars but it is not necessary that the whole prosecution story or all material particulars should be corroborated.

(6) Corroborative evidence required for accepting the testimony of an accomplice need not by itself conclusively establish the guilt of the accused. It is sufficient if it is a piece of circumstantial evidence which tends to connect the accused with the crime with which he is charged.

(7) Though a trap-witness is not an approver, he is certainly an interested witness in the sense that he is interested to see that the trap laid by him succeeded. He could at least be equated with a partisan witness and it would not be admissible to rely on his evidence without corroboration. His evidence is not a tainted one; it would only make a difference in the degree of corroboration required rather than the necessity for it.

(8) Corroboration need not be by direct evidence. It may be by circumstantial evidence in which case the rule relating to proof from circumstantial evidence would apply and the circumstances must be consistent with the innocence of the accused against whom the circumstance is offered as evidence.

(9) There must be corroboration in one or more material particulars but that does not mean in every particular or detail. Corroboration, as the grammatical meaning of the word implies, means only support, or in other words, an assurance of the truth which is lent to the evidence of the accomplice or the complainant by other evidence. It does not mean that the whole evidence given by the accomplice (or complainant) must be repeated wholly or in parts by witnesses other than the accomplice (or the complainant).

(10) The minimum corroboration which the law ordinarily requires of the evidence of an accomplice is evidence of at least one material fact pointing to the guilt of the accused person. The weight of such corroborative evidence which is necessary depends on the particular facts and circumstances of the case.

[66] The object of corroboration no doubt is to satisfy the court that the witnesses are telling the truth and that it is reasonably safe to act on their evidence. It is not necessary that the corroboration should be of the actual commission of the crime, for then there would be independent evidence of the commission of the offence. It would be enough corroboration if there is independent evidence of relevant circumstances connecting the accused with

A the crime: see *Datuk Haji Harun bin Idris v Public Prosecutor* [1977] 1 MLJ 15; [1976] 1 LNS 184 per Raja Azlan Shah J (as he then was).

[67] If we were to accede to the appellants' argument that SP3, SP4 and SP5 should have been charged together with the appellants for the murder of the deceased instead of being made prosecution witnesses, it will render illusory the Public Prosecutor's constitutional power to decide who among the perpetrators of the crime should be charged and who to be made prosecution witnesses. The implication is to render s 133 of the Evidence Act completely redundant and denuded of all meaning, which goes against an established canon of statutory interpretation that the legislature does not legislate in vain. We are therefore constrained to reject the appellants' argument.

[68] In *Yap Ee Kong*, the conviction of the second appellant was set aside because the evidence against him was based on the bare statement of the accomplice and it was a serious misdirection on the part of the appellate judge to consider the previous statement of an accomplice as good corroboration. As regards the first appellant, there was hardly any evidence against him in the first place and the question of corroboration did not arise. It was therefore a case where there was no corroboration of the accomplice's evidence, unlike the case before us.

[69] In the case before us, there was in fact corroboration of the evidence of SP3, SP4 and SP5 but despite that the learned trial judge went a step further by reminding herself of the need to be cautious with their evidence, which would have been necessary had there been no corroboration of their evidence and the court was relying entirely on the uncorroborated evidence of the accomplices: see the Privy Council case of *Chiu Nang Hong v Public Prosecutor* [1965] 1 MLJ 40.

[70] *Chiu Nang Hong*, we need to mention, was a rape case where there was no evidence coming from a source independent of the complainant which tended to show that she did not consent of her own free will. The complainant had testified at the trial that she had been threatened into submission with violence by the appellant.

[71] The question is whether there is corroboration of at least one material fact of the evidence of SP3, SP4 and SP5 that points to the guilt of the appellants, bearing in mind the prosecution was relying on common intention under s 34 of the Penal Code to prove its case against the second and third appellants who did not partake in the actual act of murdering the deceased.

[72] Having gone through the evidence carefully, we find that the testimonies of the three accomplices were corroborated not just by one material

fact that points to the guilt of the appellants but by at least eight strands of neutral evidence, thus making it safe for the learned trial judge to have relied on their evidence.

[73] The independent evidence that affords corroboration to the evidence of SP3, SP4 and SP5 are the following:

(a) two fatal stab wounds were inflicted on the body of the deceased as found by the Forensic Pathologist (SP2), one in the chest and the other in the left loin. This independent and unchallenged forensic evidence corroborates SP5's evidence that the deceased was stabbed twice by the third appellant. In any event, it was never put to SP3, SP4 or SP5 in cross-examination that the third appellant was not present at the scene of crime;

(b) there was blood splattered on the floor right next to the deceased's bed. This corroborates the accomplices' evidence that he was stabbed in his bedroom while he was sleeping;

(c) there was blood on the floor in the living room. This corroborates the accomplices' evidence that the deceased came out of the room after being stabbed;

(d) the deceased's body was found in the corridor in front of the first appellant's house, which was located just next to the deceased's house. This corroborates the accomplices' testimony that the deceased chased after them before he collapsed and died;

(e) the parang (exh X9) was found on the floor in the living room of the deceased's house. This corroborates SP4's evidence that he threw the parang on the floor in the living room as he fled the scene after the murder;

(f) the existence of the altar in the first appellant's house as shown in photo no 17 of exh P7 corroborates the accomplices' evidence that the first appellant performed a 'puja' prayer to bless the parang (exh X9) after the first attempt to carry out the murder plan was aborted due to SP4's change of mind;

(g) no trace of blood, let alone the blood of the deceased was found on the parang (exh X9) as confirmed by Scientific Officer P Revathi a/p Perumal (SP6). This corroborates SP4's evidence that he did not use the parang to slash the deceased and negates the appellants' suggestion in cross-examination that he had used the parang to slash the deceased; and

(h) the assailants entered the deceased's house twice and with ease at such unearthly hours. This is strong circumstantial evidence to corroborate the accomplices' testimony that the second appellant had, as pre-arranged, opened the main door to let them in to carry out the murder. As we

mentioned, this evidence was not challenged at all in cross-examination and is therefore deemed to be admitted.

[74] We cannot therefore accede to the appellants' contention that there was no corroboration of the accomplices' evidence to link them with the murder of the deceased. On the evidence before her, the learned trial judge was right in our view to accept SP3, SP4 and SP5 as witnesses of truth on all material particulars, whose evidence taken together and in its entirety shows that the murder of the deceased by the third appellant was in furtherance of the common intention of all three appellants.

[75] That circumstantial evidence may provide corroboration is established by *R v Hills* [1988] 86 Cr App R 26, where the court held as follows:

> Corroboration is not infrequently provided by a combination of pieces of circumstantial evidence, each innocuous on its own, which together tend to show that the defendant committed the crime. For example, in a rape case, where the defendant denies he ever had sexual intercourse with the complainant, it may be possible to prove (1) by medical evidence that she had had sexual intercourse within an hour or so prior to the medical examination, (2) by other independent evidence that the defendant and no other man had been with her during that time, (3) that her underclothing was torn and that she had injuries to her private parts. None of these items of evidence on their own would be sufficient to provide the necessary corroboration, but the judge would be entitled to direct the jury that if they were satisfied so as to feel sure that each of those three items had been proved, the combined effect of the three items would be capable of corroborating the girl's evidence.

[76] As against the finding of the learned trial judge that SP3, SP4 and SP5 were credible witnesses, learned counsel for the appellants sought to discredit their evidence by saying that their evidence was inconsistent, unclear, imprecise and 'riddled with contradictions.

[77] Learned counsel for the third appellant went so far as to submit that SP3, SP4 and SP5 had given evidence on behalf of the prosecution 'In Exchange For Want Of Prosecution'. *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 was cited in support where Edgar Joseph Jr SCJ criticized the trial judge for adopting the 'Nelsonian' approach of accepting at face value the evidence of the accused's girlfriend when he should have recognized that she might have every possible motive to suppress the truth and to lie, bearing in mind she was an obvious suspect.

[78] With due respect, we find the allegation to be without basis. An allegation of this nature should not be made based purely on a hunch or conjecture. In the first place it was not even put to SP3, SP4 and SP5 that they

had been promised with immunity from prosecution in return for implicating the appellants in the murder of the deceased.

[79] By failing to put the allegation to SP3, SP4 and SP5 in cross-examination, these witnesses had been deprived of the chance to defend their positions either by confirming the allegation or denying it while they were still in the witness box and while still under oath. One must not assume that their answers to the question, if put, would be unfavourable to the defence and favourable to the prosecution and therefore futile to ask. In any event it was entirely for the public prosecutor to decide whom to call as witnesses to ensure that justice is done. The allegation is therefore wholly unjustified and has no bearing on the correctness of the decision of the High Court to convict the appellants.

DISCREPANCIES IN EVIDENCE

[80] Learned counsel for the second appellant submitted that in so far as it implicated the second appellant, the evidence of SP3, SP4 and SP5 should not be believed in view of the material discrepancies in and between their evidence, as follows:

(a) in examination-in-chief SP4 said that when he, SP3 and SP5 went up to the first appellant's house and started drinking alcohol, the second appellant and her daughter were in the first appellant's house, but in cross-examination SP4 said the second appellant and her daughter were not present during the discussion in the first appellant's prayer room;

(b) in re-examination, SP4 testified that he went to the first appellant's house in the evening, he could not remember if the second appellant was in the first appellant's house, but changed his story later when he said he saw the second appellant in the first appellant's house when he went to his house for the second time;

(c) SP5 in examination-in-chief testified that he went to the first appellant's house for the first time with SP4 and the third appellant on 15 February 2012 after 5pm and that on arrival he saw the first appellant's mother and the second appellant and her daughter were also there, but in cross-examination SP5 said he only met the second appellant when he came to the first appellant's house for the first time after 5pm and he did not meet the second appellant nor her daughter when he went up to the first appellant's house for the second time after 9pm;

(d) SP5 testified that the second appellant not present during the discussion in the first appellant's prayer room, but later said the second appellant was in the first appellant's house from 9pm to 9.30pm and left when he came to the hall after drinking in the kitchen;

(e) SP3 and SP4 testified that it was the third appellant who gave money to SP3 to buy alcohol in the evening of 15 February 2012, but SP5 testified that it was the second appellant who gave RM50 to the first appellant, who then passed it to the third appellant before handing it to SP3; and

(f) SP3 testified that they left the second appellant's house on their first entry because the deceased had not slept yet, but SP4 and SP5 testified that they became afraid and returned to the first appellant's house.

[81] It was submitted that the above discrepancies in SP3's, SP4's and SP5's evidence shows that they did not see the second appellant in the first appellant's house as claimed by SP3 and that they only saw her in front of her own house. It also shows, according to counsel, that the first and third appellants did not call anyone else into the prayer room, let alone the second appellant who was not in the first appellant's house at that point of time. In short, the contention was that the second appellant was never in the first appellant's house at any time prior to the murder of the deceased.

[82] The proper approach to deal with discrepancies in evidence is well settled by case law. In *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105b it was held that even where a witness demonstrably lies, it would be to go too far to say that his evidence must be rejected entirely. The proper way to deal with the evidence of such witness is to treat it with suspicion and caution. In considering them, what the court has to decide is whether they are of such a nature as to discredit the witness entirely and render the whole of his evidence worthless and untrustworthy: see *De Silva v Public Prosecutor* [1964] 1 MLJ 81.

[83] In *Ugar v State of Bihar* AIR [1965] SC 277 the Supreme Court of India pointed out that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. Raja Azlan Shah FJ (as he then was) spoke in similar vein when he said in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 at p 19:

> In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a notebook and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is

fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinize each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

[84] In the case before us, it was not suggested that SP3, SP4 and SP5 had demonstrably lied in all aspects of their evidence that implicated the second appellant. We have taken note of the alleged discrepancies in the evidence of SP3, SP4 and SP5 as pointed out by learned counsel for the second appellant, but we do not find the discrepancies, if at all they can be described as discrepancies, to be so material as to vitiate the finding of guilt against the second appellant. The court must not concern itself with trivialities for to do so will divert attention away from the real issues before the court.

[85] At the risk of repetition, we need to emphasise that the second appellant had played a key role in the murder of her husband by opening the front door of the house to allow SP3, SP4 and SP5 to enter the house and to pass the pillow to SP5, which evidence she did not challenge at all in cross-examination.

COMMON INTENTION

[86] We now come to the issue of common intention. This criminal law concept came to life in Malaysia with the enactment of s 34 of the Penal Code. The section provides as follows:

When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[87] In *Mahboob Shah v Emperor* AIR 1945 118 the Privy Council explained in erudite terms the purport of s 34 of the Indian Penal Code which is in pari materia with s 34 of our Penal Code:

Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intention of all' nor does it say 'an intention common to all'. Under the section, the essence of that liability is to be found in the existence of a common intention animating the Respondent leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the Respondent persons in the furtherance of the common intention of all. If this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone.

[88] In the earlier case of *Birendra Kumar Ghosh v Emperor* AIR 1925 PC 1, the Privy Council had said this on s 34 of the Indian Penal Code:

> Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it. In other words, 'a criminal act' means that unity of criminal behavior, which results in something for which an individual would be punishable if it were done by himself alone, that is a criminal offence.

[89] In *Ferose bin Tamure Mohamad Khan*, this court in dealing with s 34 of the Penal Code referred to *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37 and *Manikumar Sinappan & Ors v Public Prosecutor* [2015] MLJU 1956; [2016] 2 MLRA 1 for the proposition that physical presence is not necessary to constitute participation in every case. It is sufficient for the accused to have done an act with some nexus to the offence.

[90] This answers the first appellant's argument that he could not be held liable for the murder of the deceased as he was not present at the scene of crime and did not take part in the stabbing of the deceased. By finding SP3, SP4 and SP5 to be truthful witnesses, clearly the learned trial judge had accepted as a fact that the first appellant was the mastermind behind the murder of the deceased although he was not physically present when the deceased was stabbed to death by the third appellant.

CONCURRENT FINDINGS OF FACT

[91] Lastly but by no means the least important, the High Court and the Court of Appeal had made concurrent findings of fact, in particular a finding that the murder was committed in furtherance of the common intention of all three appellants. We do not think, in the circumstances, it is right for us to substitute those findings of fact with findings of our own. In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2004] 3 MLJ 405 this court, inter alia, noted as follows:

> [231] It is settled law that very rarely does a higher appellate court interfere with concurrent findings of fact by the courts below. Such view was expressed by the Privy Council in the case of *Satter Buxoo & another v The Queen* [1988] 1 WLR 820 PC, an appeal from Mauritius, where it is said at p 824:
>
> > In the present case, however, it is plain that the circumstances of the appeal take it far outside any possible application of the principles in question. No point of law is involved. The only issue before the Intermediate Court and the Supreme Court was whether on the evidence led the defendants had been identified as being among the persons who carried out the serious assault which was undoubtedly perpetrated on the victim Fockeena. The Intermediate Court found that they had been and the finding was upheld by the Supreme Court. The Board could never consider it right to interfere with a concurrent finding of fact of that nature.

[232] And nearer home, that seems to be also the approach of this court as expressed in the recent case of *Kelangkota-Rakan Engineereing JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn & Ors* [2003] 3 MLJ 257 at p 273 where Abdul Malek Ahmad FCJ (as he then was) said:

> In our view, looking at the above cited passages from the judgment of the Court of Appeal and having regard to the fact that the issue that was decided by the Court of Appeal and the High Court was clearly one of fact, there is obviously no merit in the contention of the appellants as found in the grounds of appeal that the Court of Appeal erred in law in deciding as they did. Even assuming for a moment that the Court of Appeal erred in the application of the principles of law to the particular set of facts in the instant appeal, there is no room for this court to reverse the concurrent finding of fact made by the High Court and the Court of Appeal that the appellants were the guilty party in breach of the agreements since it is trite that the appellate court is not prepared to interfere with the concurrent finding of facts made by the court below as held by this court in *Lim Geak Liang v East West UMI Insurance Bhd* [1997] 3 MLJ 517 at p 523.

[92] In *Public Prosecutor v Munusamy* [1979] 2 MLJ 286; [1980] 1 LNS 63, the former Federal Court made it clear that:

> Where there have been concurrent findings of fact in the lower courts it should not be made the practice in the appeal court to review these concurrent findings of fact unless it is shown that there was no evidence to support the inferences drawn in the lower courts.

[93] It has not been shown that the concurrent findings of fact by the courts below are unsupported by the evidence, direct or circumstantial. Of crucial importance to note in this regard is that the concurrent findings involve the question of the credibility of the witnesses, namely SP3, SP4 and SP5. The Privy Council said in *Antonio Dias Caldeira v Frederick Augustus Gray* [1936] 1 MLJ 110; [1934] 1 LNS 5 that the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong. See also *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b (PC); *Samar binte Mansor v Mustafa Kamarul Arifin* [1974] 2 MLJ 71.

[94] In *Samar binte Mansor*, Raja Azlan Shah FCJ (as he then was) raised the question whether an appellate court should substitute its own views of the facts for that of the trial judge. He went on to say:

> For an appellant to succeed in an appeal against a finding of fact made by a single judge, he must convince the appellate court that the learned judge was wrong in his

A conclusion. That the appeal is by way of rehearing does not alter the situation. A rehearing is not however a retrial of the issues. The question is not whether an appellate court can substitute its views of the facts which of course it is empowered to do so, but whether it should do so. However such an appellate court may be in an equal position with the trial judge as to the drawing of inferences, it ought not to reverse the finding of fact unless it is convinced that it is wrong. It is not whether the inferences are right but whether an appellate court is convinced that they are wrong. If that finding is a view reasonably open on the evidence, it is not enough to warrant its reversal just because an appellate court would have come to a different view. Merely differing views do not establish that either view is wrong, but in balancing these two views an appellate court should give due weight to the nature of the facts as found by the trial judge.

[95] For all the reasons aforesaid, we are satisfied that the Court of Appeal was right in affirming the decision of the High Court to find each of the appellants guilty of the offence charged. There had been sufficient judicial appreciation of the evidence by the learned trial judge and she had not misdirected herself either on the facts or on the law.

[96] The question of miscarriage of justice does not arise at all. In the circumstances, the appeals are dismissed. The decision of the Court of Appeal is affirmed.

Appeals dismissed and Court of Appeal's decision affirmed.

Reported by Ashok Kumar